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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. YA KAHA HER, Defendant and Appellant.	F054904 (Super. Ct. No. F06905971) **OPINION**

APPEAL from a judgment of the Superior Court of Fresno County. W. Kent Levis, Judge.

Manuel J. Baglanis, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Michael P. Farrell, Assistant Attorney General, Julie A. Hokans and Judy Kaida, Deputy Attorneys General, for Plaintiff and Respondent.

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Ya Kaha Her (appellant) and Lee Johnny Vang, Kou Heng Lee, Debra Mercy Bacud, Mario Adrian Calderon, and Damian Anthony Vasquez (jointly, codefendants)

were all charged with the murders of Torn Joy Saetern,[1] in count 1, and Lee Cha, in count 2 (Pen. Code, § 187, subd. (a)).[2] As to count 1, it was further alleged that Vang personally and intentionally discharged a firearm causing death (§ 12022.53, subd. (d)); that appellant and Lee personally and intentionally discharged a firearm in the commission of the offense (§ 12022.53, subd. (c)); that the murder was committed during the commission of a robbery (§ 190.2, subd. (a)(17)); and that appellant, Vang, Lee, Bacud and Calderon committed multiple murders (§ 190.2, subd. (a)(3)). As to count 2, it was further alleged that appellant and Vang personally and intentionally discharged a firearm in the commission of the offense (§ 12022.53, subd. (c)); that Lee personally and intentionally discharged a firearm causing death (§ 12022.53, subd. (d)); that the murder was committed during the commission of a robbery (§ 190.2, subd. (a)(17)); and that appellant, Vang, Lee, Bacud, and Calderon committed multiple murders (§ 190.2, subd. (a)(3)).

Prior to trial, Lee entered into a plea bargain with the People that included the terms that he plead guilty to two counts of voluntary manslaughter with use of a gun, that he testify for the People at the remaining codefendants' trial, and that he waive his right to appeal in exchange for a state prison sentence of 23 years.

Following a jury trial, Vasquez, Bacud, and Calderon were acquitted of all charges. Appellant and Vang were found guilty of all charges, and the special allegations were found true. Vang has filed a separate appeal with this court.

Appellant was sentenced to state prison for an indeterminate term of life without the possibility of parole, plus a determinate term of 20 years for the firearm enhancement, in the death of Saetern. He was sentenced to a concurrent indeterminate term of life

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[1]The charging documents and verdicts refer to the victim as Torn Joy Sattern. The victim's true name is Torn Joy Saetern, as noted in his death certificate.

[2]All further statutory references are to the Penal Code unless otherwise stated.

without the possibility of parole, plus a determinate 20 years for the firearm enhancement in the death of Cha. Appellant received statutory credit for 572 days' actual time served.[3]

On appeal, appellant contends: (1) that the trial court denied his constitutional right to confront and cross-examine the witnesses and violated Evidence Code section 356 in connection with its ruling on the *Aranda/Bruton*[4]motions; (2) that there is insufficient evidence to support his conviction for first degree felony murder and the robbery special circumstances related to each count; (3) that the trial court failed to adequately instruct on the requirements for corroboration of accomplice testimony; (4) that the trial court erred when it failed to give pinpoint instructions on theft; and (5) that cumulative prejudicial error requires reversal of his convictions. We affirm.

FACTS

In 2006, Lee Cha and his wife lived in Merced where, until being laid off, Cha worked as an automobile mechanic in his brother Tong Cha's repair shop. In May of 2006, Cha asked Doua Xiong, a relative, if he knew anyone who might know of a mountain location where Cha could plant marijuana. A few weeks later, Cha asked Xiong if he knew anyone who sold marijuana and cocaine. During the conversation, Cha stated that he wanted to purchase methamphetamine to sell in Alaska.

In June of 2006, Xiong went to his cousin Kou Heng Lee's house in Fresno. Lee was addicted to crystal methamphetamine and smoked about $50 to $75 worth of methamphetamine daily. Lee supported his addiction by selling stolen goods and crystal methamphetamine.

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[3]Respondent notes that the abstract of judgment erroneously states that the enhancements were for violations of "PC 190.2(a)(17)" instead of section 12022.53, subdivision (c). We order the abstract of judgment corrected.

[4]*People v. Aranda* (1965) 63 Cal.2d 518 (*Aranda*); *Bruton v. United States* (1968) 391 U.S. 123 (*Bruton*).)

Xiong told Lee that Cha was interested in purchasing drugs and asked Lee if he knew where to buy them. Lee stated that he did. Xiong gave Lee and Cha each others' phone numbers.

The next day, Cha telephoned Lee and said he wanted to buy a large amount of crystal methamphetamine but first wanted samples of the drug, for which he agreed to pay $200. Lee told Cha that Cha would have to buy the drugs from a direct source.

A week later, Lee called Cha and told him he had obtained samples of two different types of crystal methamphetamine. Lee and Debra Mercy Bacud, a friend and fellow drug user, drove Bacud's car to meet Cha in a FoodMaxx parking lot in Fresno. Lee gave "half an eight ball" of methamphetamine to Cha, and Cha gave Lee $100.

Two days later, Cha telephoned Lee and said he wanted to purchase two pounds of crystal methamphetamine. Lee told Cha the drugs would cost $10,000 per pound, but Cha said he did not want to pay that much.

Lee was not able to obtain the methamphetamine and decided to sell Cha "bad dope," containing no methamphetamine, instead. Bacud told Lee that her boyfriend, Damian Anthony Vasquez, could obtain the "bad dope." Lee then met with Vasquez, who stated he had a friend who could get Lee two pounds of "bad dope" and Lee would pay for the drugs later. The next day, Lee telephoned Cha and told him the drugs would cost $8,000 per pound. Cha agreed to that price and said he would let Lee know when he was ready to complete the purchase.

Lee then called Xiong and asked if Cha was an undercover police officer, but Xiong said that Cha was his cousin and that he had been a mechanic.

On July 24, 2006, Cha telephoned Lee and told him he was ready to purchase the drugs. That night, Lee met with Vasquez and Bacud at a motel to discuss finding someone who would act as a "connection," someone who would take the blame for the "bad dope." Lee telephoned his friend, appellant, who came to the motel with Lee Johnny Vang and Mario Adrian Calderon, and met with Lee, Vasquez, and Bacud. Lee

told appellant he would pay him $1,000 for acting as a fake connection and for selling the "bad dope," and Lee also agreed to give Vasquez, Bacud, and Vang each $1,000.

On July 26, 2006, Cha telephoned Lee and said he would be coming to Fresno to buy the drugs. Lee telephoned Vasquez, who said he would pick up the drugs. Cha later telephoned Lee to say he was almost in Fresno. Bacud picked up Lee and they met Vasquez at his mother's house, but Vasquez did not have the fake drugs.

When Cha telephoned Lee and said he was in Fresno, Lee told Cha he first wanted to see the money. Cha agreed to show him the money and stated that his brother would be with him. Lee, Bacud and Vasquez drove to meet Cha. They drove Vasquez's mother's Lexus "[t]o make it look good," and picked up Vang for "protection."

Lee and Vang met Cha and his brother on a side street near FoodMaxx. Cha got into the Lexus and showed Lee the money, which was in a brown envelope. Lee phoned Vasquez and told him to pick up the drugs. Cha went back to his car.

Lee and Vang drove to Lee's house, where they picked up two loaded guns, a nine-millimeter and a .32-caliber. Lee gave Vang the .32-caliber gun. Lee and Vang then met Vasquez and Bacud in a grocery store parking lot. A couple of minutes later, appellant and Calderon arrived in appellant's car.

Lee got the fake drugs from Vasquez, gave them to appellant, and told appellant to find a spot to meet near Kearney Park and then wait for him and Cha. Appellant and Calderon left in appellant's car. Vasquez and Bacud also left.

Lee returned to the Lexus and telephoned Cha, who stated he was at an Asian market in Fresno. Lee and Vang drove to the store parking lot where Lee got out of the car and spoke to Cha. Vang went into the market to get something to eat. Cha pointed to Torn Saetern,[5] who was in another vehicle, and stated that he was the one who was going to buy the drugs. Cha told Lee he was going to sell the drugs to Saetern for a lot more

[5]Cha's brother knew Saetern from the auto repair shop, where Cha's brother had previously repaired Saetern's vehicle. Saetern's parents lived in Alaska.

and asked that Lee not say anything about the price. Cha would then give Lee a "back cut" of $1,000 once the deal was done. Lee returned to the Lexus and telephoned appellant, who stated that he was still looking for a place and would call when he found a good spot.

Cha's brother exited the market and walked to Cha's car, where Cha told his brother he was going with Lee. Cha's brother did not want Cha to go with Lee because they did not know him, but Cha said that Lee was related to Xiong.

Lee and Vang drove towards Kearney Park and discussed the presence of the third man (Saetern) who was with Cha. They thought it was suspicious that Cha had not previously mentioned him. Cha and his brother followed the Lexus in Cha's car. Saetern followed in his vehicle. Cha telephoned Lee and asked if it would be better if they all traveled in one car. Lee agreed and directed the group to drive to FoodMaxx, where they would get into one car.

En route to FoodMaxx, Lee telephoned appellant and told him Cha had two cars and three people. Appellant informed Lee that he was armed and that the fake drugs looked like "[a] big chunk of chalk wrapped in a plastic bag." Since appellant did not know if the fake drugs would pass for real drugs, Lee decided they would just rob Cha and Saetern instead. Lee informed Vang of this decision, and Vang agreed. Lee telephoned appellant and informed him of their change in plans.

Once at the FoodMaxx parking lot, Cha, his brother, and Saetern all got into the Lexus. Cha's brother then decided to return to Merced because he had to go back to work. He was suspicious of Lee and Vang, and the Lexus did not have a front license plate, which he also thought was suspicious. As Cha's brother stepped out of the Lexus, he noticed a gun between Lee's legs. Cha's brother drove Saetern's vehicle back to Merced while Lee, Vang, Cha, and Saetern drove away in the Lexus. Cha left his vehicle in the FoodMaxx parking lot. Cha's brother wrote down the license plate number of the Lexus as Lee, Vang, Cha, and Saetern drove off.

Lee drove the four toward Kearney Park. When Lee spotted appellant's car on a dirt road on the north side of Kearney Boulevard, Lee turned onto the dirt road and parked near appellant. Calderon was in the passenger seat of appellant's car. Lee told Cha and Saetern that appellant was the "connection."

The four men got out of the Lexus, and appellant got out of his vehicle. Calderon stayed in the car. As Lee walked toward appellant's car, Cha told Lee that his brother had the money but he need not worry as he would give Lee the money once they got back.

Lee and Cha continued toward appellant's car to look at the drugs. Saetern looked into appellant's car at the drugs, walked to the middle of the road, and began to make a phone call. Vang stood next to Saetern in the middle of the road; Cha was next to Saetern, who stood in front of Lee, with his back to Lee. Lee pulled out a gun and fired three shots from his nine-millimeter gun into Cha's back. Appellant then fired his gun at Cha from behind his car. At the same time, Vang shot Saetern in the head.

Both Cha and Saetern fell to the ground. Appellant then drove away. Lee took Cha's wallet from his pocket and Cha and Saetern's cell phones. Lee and Vang then left the scene and drove to Vasquez's house, where they told Vasquez and Bacud that they had shot Cha and Saetern and that there was no money.

Lee later told Vasquez that he was going to rob Cha and Saetern, but that he shot them instead. Lee checked the number of bullets in his nine-millimeter gun and found that three rounds were missing.

Lee telephoned appellant and told him to come to Vasquez's house. Appellant and Calderon arrived and brought the "bad dope" with them. The group discussed the murders and whether anybody found the money. Lee told the group not to say anything and to "[j]ust forget about it." When the group disbanded, Lee gave Cha's wallet to Bacud. He left the "bad dope" at Vasquez's house. Lee put the stolen cell phones in a desk on his front porch.

About two days after the murders, Lee told appellant to drop his gun off so that Lee could sell it for him. Lee later sold both guns used during the murders for another nine-millimeter gun and $200. He put the new gun under a drawer at his house.

In the meantime, at approximately 6:00 a.m. on July 27, 2006, an almond farmer discovered the bodies of Cha and Saetern near the intersection of Kearney Boulevard and Hayes Avenue. Police subsequently discovered $3,800 in cash in Cha's sock and $16,000 in cash in a brown envelope in the small of his back under his shirt. They found $40 in Saetern's back pants pocket. Six expended .32 automatic cartridge casings and three nine-millimeter Luger cartridge casings were found near the bodies.

Also at about 6:00 that morning, Cha's wife telephoned Xiong and told him that Cha and another man had left the day before about 4:00 p.m. and had not returned. Xiong gave Cha's wife Lee's telephone number but, when Cha's wife called, no one answered.

Xiong also telephoned Lee but got no answer. Xiong and his father went to Lee's house several times, but Lee was not there. After the last try, as Xiong and his father drove away, Lee telephoned Xiong and told him to stop looking for him and that "the Mexicans" would not let him move. Xiong asked where Cha and Saetern were, and Lee said he did not know.

During a second conversation with Xiong, Lee asked that Xiong telephone him and use a fake name so that "the Mexicans" would release him. Xiong telephoned Lee, but Lee did not answer. At 2:50 p.m., Lee sent Xiong a text message asking where he was and stated he was stuck. The message also said, "UMUST not say nothing. N don't go 2 my house at all. PLEASE DON'T."

Cha's brother told police that he had been with Cha and Saetern the day before in Fresno and that Cha and Saetern went with two people in a white Lexus. He gave the officers the license number of the Lexus. Cha's brother told officers he had received a call from Cha's cellular phone shortly after he saw them drive away but, when he

answered, no one responded and he heard voices speaking in Hmong and a loud "bang, bang."

Police contacted Cha's wife, who stated that Cha drove to Fresno the previous day at 4:00 p.m. and that Xiong told her Cha had gone to buy drugs from Lee.

The following day, July 28, 2006, Xiong told officers about his conversations with Lee and Cha; that Cha had asked if he knew anyone who sold methamphetamine; that Xiong had exchanged the names and phone numbers between Cha and Lee; and that Xiong had gone to Lee's house several times the previous day because Cha's wife had told him Cha was missing. Xiong showed police the text message he had received from Lee.

Vasquez's father was identified as the registered owner of the Lexus. Vasquez's father told officers that his wife, who lived at a different address, drove the Lexus and that she had been out of town between July 25 and July 27.

Police subsequently interviewed Vasquez on August 1, 2006. Vasquez stated that he had driven the Lexus on July 25 to meet Lee at a friend's house. The following day, July 26, Lee borrowed the Lexus for between one and a half to three hours. Vasquez stated that he was present when Lee discussed a drug deal at his house.

On August 2, 2006, police executed a search warrant for Lee's residence. Police found a firearm on the floor under the dresser in Lee's bedroom closet, a box of live nine-millimeter ammunition, a piece of paper containing Cha's name and cell phone number, three cell phones in a drawer of a dresser or desk on the front porch, and a plastic grocery bag containing a white, rocky, powdery substance, which was later discovered to contain no controlled substance and weighed a little less than a pound.

Police interviewed Lee while the search warrant was being executed. After telling officers several versions of the events, he stated he wanted "to make a deal" and told officers that he, Calderon, appellant, and Vang were at the murder scene. Lee told officers that he called appellant because he needed somebody to pose as the drug dealer. Lee stated that he met with Vasquez, Bacud, appellant, Calderon, and Vang at a motel to

discuss the drug deal. The group decided to carry firearms for protection and discussed having to shoot someone "for the money." Lee told officers he shot Cha three times with a nine-millimeter, Vang fired a .32-caliber, and appellant fired a nine-millimeter. Lee was arrested for the murders at the end of the interview.

On August 4, 2006, officers arrested Vang, appellant, and Calderon at appellant's house. Appellant was interviewed that same day. After first claiming that he was fishing on the day of the murders, he then admitted that he met with "Jesse" and Lee on July 25 and agreed to participate in a drug deal. Later that night, "Jesse" gave him a package containing two pounds of methamphetamine. Appellant said he transported the drugs to Kearney Park on July 26, but that the victims were dead when he arrived at the scene. He then changed his story and stated that he was on his way to Kearney Park when he saw Lee in a nice, gray-colored, newer vehicle. Lee signaled appellant to pull over. A red Honda Civic was also at the location, but drove away. The gray vehicle then dropped off two Asian males, who were shot while appellant sat in his car.

Appellant then stated the red car was not at the scene; he was in his car with the drugs between the seats; the gray vehicle drove in behind him; two Asian males got out of the vehicle and walked over to his vehicle to look at the drugs. Appellant claimed he heard the Asian men talking in Hmong about robbing them for the drugs. Appellant telephoned Lee, who was still in the gray car, and warned him. Lee got out of the car. As appellant started to get out of his car, he reached for a .22-caliber pistol under his shirt. Appellant then heard 10 to 12 shots being fired at the men. Appellant saw one of the men fall and heard the victim's weapon fall to the ground. He picked up the victim's gun, a black semiautomatic nine-millimeter handgun, and shot the victim three or four times in the torso. He thought the victim was already dead when he did so. Appellant denied intending to rob or kill anyone and then explained that he was armed because it was dangerous to do a drug deal.

Officers transported appellant to the murder scene, where he described the events leading up to the murders. Appellant directed the police to a location where he claimed

he threw the gun into the canal, but a subsequent dive team was unable to find the gun. Calderon confirmed the approximate location where appellant threw the gun into the canal.

Vang also was interviewed by officers on August 4, 2006. He denied any knowledge of the murders. When asked what had happened, Vang stated that the police already knew "the story" because "somebody got a big mouth."

Calderon was reinterviewed on August 9, 2004. He initially denied involvement in the murders but admitted knowing there was going to be a drug deal on Kearney Boulevard involving "fake dope" in order to "rip-off" the victims for the money. Calderon stated he was a passenger in a black Honda Civic during the murders and that the drugs were between the seats in the car. Calderon said, "'I saw two dudes get shot over some dope … over what was supposed to be a deal to rob two guys … using fake dope.'" He denied getting out of the car during the killings.

That same day, officers arrested Bacud. Cha's vehicle insurance card was in Bacud's purse, and Lee's telephone number and items containing Cha's name were inside her computer bag. Vang's fingerprints were found on several of the articles.

Officers interviewed Bacud, who first denied any knowledge of the murders. She then stated that she overheard a conversation the night before the murders regarding a drug deal of two and a half pounds of methamphetamine, but she denied involvement. Bacud stated that, after the murders, Lee told her he had been involved in "something real bad" and he had shot someone. He later gave her some credit cards and a driver's license belonging to Cha.

An autopsy conducted on Cha concluded that he died of multiple gunshot wounds. Saetern died of a gunshot wound to the head. The gunshot wounds to both Cha and Saetern were caused by large caliber bullets.

Testing later revealed that five of the six .32 automatic cartridge casings found at the scene were fired from the same firearm. There was insufficient information to determine whether the sixth .32 automatic cartridge casing was fired from that same

firearm. The three nine-millimeter Luger cartridge casings found at the scene were fired from the same nine-millimeter firearm, but were not fired from the Luger nine-millimeter firearm seized from Lee's home. It was also determined that three of four bullets found at the scene were not fired from the weapon seized at Lee's house, and testing on the fourth bullet fragment was inconclusive.

At trial, Lee claimed he was under the influence of methamphetamine when he committed the murders.

Cha's brother testified that, on the evening of July 26, 2006, after Cha, Saetern, and two others left the FoodMaxx parking lot in the Lexus, he received a telephone call from Saetern, but no one responded when he answered the phone. Instead, Cha's brother heard people talking in Spanish, laughing, a car door open and shut, and two gunshots. The call ended after nine minutes. Later that night, Cha's brother drove back to the FoodMaxx parking lot and found Cha's car still there.

Cha's brother testified that he had not given certain information to the police because he was fearful of the codefendants' relatives.

DISCUSSION

1. Admission of Hearsay Statements of the Nontestifying Codefendants and Right to Confrontation and Cross-examination

By way of pretrial in limine motions, defense counsel for appellant and for the codefendants made *Aranda/Bruton* objections to the prosecutor's predicted use of hearsay statements given by each of the defendants. Pointing out the difficulties in redacting lengthy statements by appellant, Vasquez, Calderon, Bacud and Vang in order to comply with *Aranda/Bruton* concerns (see *post*), the prosecutor proposed to control the flow of the evidence by having the officers who took the defendants' statements testify to admissible portions of the statements rather than introducing redacted transcripts or tape recordings of the statements themselves. Counsel for appellant, as well as counsel for the codefendants, argued against this procedure because it would result in unpredictability and unintended *Aranda/Bruton* error. The trial court's solution was to require the

prosecution to make offers of proof. When the prosecutor noted that defense counsel would have the actual statements to use in cross-examining the officers, counsel for appellant argued that, because of *Aranda/Bruton* concerns, "our Sixth Amendment right to cross-examination would [nonetheless] be restricted and constricted by that procedure." The trial court responded, however, that such restriction would be present, too, if redacted statements were used rather than tailored testimony from the officers.

Thereafter, officers did testify to hearsay statements made by appellant and each of the codefendants. The trial court gave a limiting instruction informing the jury that the nontestifying parties' statements could be used only as to the declarants. During deliberations, the jury requested it be provided with the actual statements. The trial court denied the request because the actual statements had not been placed in evidence.

Appellant now claims this resulted in error in the following ways. First, the testimony of the officers was insufficiently tailored (redacted, if you will) to avoid *Aranda/Bruton* error. Second, the trial court abused its discretion and denied appellant's "constitutional right to due process, confrontation and adequate cross-examination" by "choosing one constitutional right [*Aranda/Bruton*] over another [cross-examination]." Third, the trial court violated appellant's "right to due process under Evidence Code section 356." (Some capitalization omitted.) We disagree.

A. No *Aranda/Bruton* Error Occurred

The Sixth Amendment to the United States Constitution, made applicable to the states through the Fourteenth Amendment, provides that in criminal prosecutions, the defendant has the right to be confronted with the witnesses against him. (U.S. Const., 6th Amend.) The Sixth Amendment right to confrontation includes the right of cross-examination. (*Pointer v. Texas* (1965) 380 U.S. 400, 404; *People v. Fletcher* (1996) 13 Cal.4th 451, 455.)

> "A recurring problem in the application of the right of confrontation concerns an out-of-court confession of one defendant that incriminates not only that defendant but another defendant jointly charged. Generally, the confession will be admissible in evidence against the defendant who made

> it (the declarant). (See Evid. Code, § 1220 [hearsay exception for party admission].) But, unless the declarant submits to cross-examination by the other defendant (the nondeclarant), admission of the confession against the nondeclarant is generally barred both by the hearsay rule (Evid. Code, § 1200) and by the confrontation clause (U.S. Const., 6th Amend.)." (*People v. Fletcher, supra*, 13 Cal.4th at p. 455, fn. omitted.)

The *Aranda/Bruton* rule addresses the confrontation clause issues raised by the introduction of a defendant's out-of-court statement in a joint trial with one or more codefendants. In *Aranda*, the California Supreme Court articulated a rule of criminal procedure prohibiting the introduction of a nontestifying codefendant's extrajudicial statement that directly or inferentially implicates a jointly tried defendant, unless the statement is redacted to eliminate the direct or inferential reference to the defendant. (*Aranda*, *supra*, 63 Cal.2d at pp. 528-531.) *Aranda* held the admission of a nontestifying codefendant's out-of-court confession, which inculpates the defendant, is not rendered harmless by a jury instruction that the evidence should not be considered against that defendant. (*Id.* at p. 526.) Instead, if the defendants are tried together, either the statement must be redacted to remove direct and indirect identification of the defendant, or it must be excluded altogether. (*Id.* at pp. 530-531.)

In *Bruton*, the United States Supreme Court held that a defendant's constitutional right to confrontation of the witnesses against him is violated by admitting the confession of a nontestifying codefendant that names and incriminates the defendant. This is so even though the jury is instructed to disregard the confession in determining the nondeclarant defendant's guilt or innocence. (*Bruton*, *supra*, 391 U.S. at pp. 135-137.)

Bruton's scope was limited in *Richardson v. Marsh* (1987) 481 U.S. 200, where the court held that, when a nontestifying codefendant's confession is redacted so that it does not facially incriminate the defendant, the admission of the statement with a proper limiting instruction will not violate the confrontation clause. (*Id.* at pp. 207-208, 211.) *Richardson* distinguished the confession in that case from the confession in *Bruton*:

> "In *Bruton*, the codefendant's confession 'expressly implicat[ed]' the defendant as his accomplice. [Citation.] Thus, at the time that confession

> was introduced there was not the slightest doubt that it would prove 'powerfully incriminating.' [Citation.] By contrast, in this case the confession was not incriminating on its face, and became so only when linked with evidence introduced later at trial (the defendant's own testimony)." (*Richardson v. Marsh*, *supra*, 481 U.S. at p. 208, fn. omitted.)

Under such circumstances, the court could properly presume that jurors would follow a limiting instruction not to consider the confession against the defendant, even if the confession incriminated the defendant when considered in connection with other evidence. (*Id.* at pp. 201-202, 208.)

1. Vasquez's statements

Appellant challenges various statements made by Vasquez during his interview with Deputy Chapman, and related to the jury by Chapman, on the basis they were insufficiently redacted and thus violated the *Aranda/Bruton* rule: (1) on July 26, Vasquez left the house for awhile, returned home, and "had company"; (2) the "company" left and then returned later that night; (3) Lee borrowed Vasquez's family's Lexus for one and a half to three hours on July 26; (4) there was a discussion about a drug deal, and Lee was "one of the individuals" present for that discussion.

No *Aranda/Bruton* error occurred here. While *Aranda/Bruton* forbids the admission of statements made by a nontestifying codefendant that incriminate the defendant (*Bruton*, *supra*, 391 U.S. at pp. 126, 135-136; *Aranda*, *supra*, 63 Cal.2d at pp. 529-530), Vazquez's reference to "company" and to a discussion of a drug deal did not implicate appellant in the criminal activity. It is only through consideration of other evidence that the jury could infer Vasquez's "company" included appellant. (See *Richardson v. Marsh*, *supra*, 481 U.S. at pp. 208, 211; *Gray v. Maryland* (1998) 523 U.S. 185, 192-196.) Under *Richardson*, any potential infringement of appellant's rights was prevented because the trial court gave a limiting instruction.

2. Calderon's statements

Appellant challenges statements by Calderon, made during his interview with Deputy Chapman and related to the jury by Chapman: (1) Calderon stated he had been

present during a discussion about a drug deal but denied any involvement, (2) Calderon admitted he was present at the scene of the murders after arriving in a black Honda Civic. Again, we find no *Aranda/Bruton* error as Calderon's statement did not incriminate appellant in the criminal activity. (Cf. *People v. Olguin* (1994) 31 Cal.App.4th 1355, 1374-1375.) It is only through consideration of other evidence that the jury could infer appellant was in the car with Calderon.

We also reject appellant's claim that Vasquez's counsel's reference to Calderon's interview as being 89 pages long was *Aranda/Bruton* error. The reference was not a statement by a nontestifying codefendant and did not incriminate appellant.

3. Bacud's statement

We similarly reject appellant's claim of *Aranda/Bruton* error relating to the challenged statement by Bacud during her interview by Deputy Toscano, and related to the jury by Toscano: The night before the murders, she overheard a conversation regarding a drug deal that was going to occur, but she had no involvement or knowledge of the actual deal. Bacud's statement did not itself implicate appellant in any criminal activity. (*Bruton*, *supra*, 391 U.S. at pp. 126, 135-136; *Aranda*, *supra*, 63 Cal.2d at pp. 529-530.)

4. Vang's statement

Vang's statement to Detective Eaton, related to the jury by Eaton, was brief: He denied any knowledge about the homicide, but the detectives already knew the story anyway because "somebody got a big mouth." Vang's statement did not implicate appellant in any criminal activity. (*Bruton*, *supra*, 391 U.S. at pp. 126, 135-136; *Aranda*, *supra*, 63 Cal.2d at pp. 529-530.)

We also reject appellant's claim that the prosecutor's remark that the interview with Vang was short, only 21 pages transcribed, was *Aranda/Bruton* error. The reference was not a statement by a nontestifying codefendant and did not incriminate appellant.

5. Appellant's statement

We also reject appellant's claim of *Aranda/Bruton* error to his own challenged statement made during his interview with Detective Eaton. The *Aranda/Bruton* rule does not apply to appellant's own incriminating statement, but rather only to those of a nontestifying codefendant. (*Richardson v. Marsh*, *supra*, 481 U.S. at pp. 207-208 [Sixth Amend. right to cross-examination violated by admission of nontestifying codefendant's incriminating statement].)

B. No *Crawford* Error Occurred

Appellant contends he was denied his right to confrontation and cross-examination in violation of the principles enunciated in *Crawford v. Washington* (2004) 541 U.S. 36. He argues, in effect, that *Crawford* undermines the *Aranda/Bruton* rule. *Crawford* error occurred, according to appellant, because "[t]hough all defense counsel were allowed to cross-examine the officers and use portions of the actual statements in their cross-examination, the court's ruling limited cross-examination by preventing counsel from asking questions that might implicate other defendants in violation of the *Aranda/Bruton* rule."

In *Crawford*, the United States Supreme Court expanded a defendant's confrontation rights by holding that an out-of-court "testimonial" statement offered against the accused is inadmissible unless the declarant is unavailable and the defendant had a prior opportunity to cross-examine that declarant. (*Crawford v. Washington*, *supra*, 541 U.S. at pp. 68-69.) There is no dispute that a statement elicited during a police interrogation is testimonial. (*Ibid.*; see also *People v. Song* (2004) 124 Cal.App.4th 973, 982.)

But *Crawford* does not overrule *Bruton* and its progeny. That Vasquez, Calderon, Bacud, and Vang's statements were "testimonial" under *Crawford* does not help appellant because the statements did not incriminate him, and the jury was instructed that the statements could not be used against him. When a statement is properly redacted and the jury is instructed not to use it against the defendant, as occurred here, the declarant is

not a "witness[] against" the defendant, and the statement does not implicate the confrontation clause. (U.S. Const., 6th Amend.) The same redaction that prevents *Aranda/Bruton* error also prevents *Crawford* error. (*People v. Stevens* (2007) 41 Cal.4th 182, 199; *People v. Song*, *supra*, 124 Cal.App.4th at pp. 983-984.)

C. No Violation of Evidence Code Section 356 Occurred

Appellant contends that the trial court's ruling preventing him from cross-examining witnesses as to the omitted portions of the codefendants' statements violated his "right to due process under Evidence Code section 356." (Some capitalization omitted.) Appellant has forfeited this claim by failing to raise it below. (*People v. Partida* (2005) 37 Cal.4th 428, 435; *People v. Ervin* (2000) 22 Cal.4th 48, 87.)

In any event, we find no error. Evidence Code section 356, in relevant part, provides: "Where part of an act, declaration, conversation, or writing is given in evidence by one party, the whole on the same subject may be inquired into by an adverse party." This provision permits the introduction of statements that are necessary for the understanding of, or to give context to, statements already introduced. (*People v. Harrison* (2005) 35 Cal.4th 208, 239; *People v. Zapien* (1993) 4 Cal.4th 929, 959.) But limits on the scope of evidence permitted under Evidence Code section 356 may be proper when, as here, inquiring into the "whole on the same subject" would violate a codefendant's rights under *Aranda* or *Bruton.* (*People v. Lewis* (2008) 43 Cal.4th 415, 458; see also *People v. Ervin*, *supra*, 22 Cal.4th at p. 87.) Appellant here points to nothing specific that he was not allowed to explore on cross-examination, nothing he was not allowed to present. He made no offer of proof at trial regarding any question he was precluded from asking. We reject appellant's contention that error occurred under Evidence Code section 356.

2. Sufficient Evidence of First Degree Felony Murder and the Robbery Special Circumstance

Appellant contends the evidence was insufficient to prove first degree murder on a robbery or attempted robbery-felony-murder theory, or to prove the special circumstance

findings that he murdered the victims during the commission or attempted commission of a robbery, because the only evidence of his participation in a robbery or attempted robbery was the accomplice testimony of Lee, which was not adequately corroborated. We reject appellant's contention.

When considering a challenge to the sufficiency of the evidence to support a conviction, we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Valdez* (2004) 32 Cal.4th 73, 104.) When reviewing the sufficiency of the evidence to support a special circumstance, the relevant inquiry is "'whether, after viewing the evidence in the light most favorable to the People, *any* rational trier of fact could have found the essential elements of the allegation beyond a reasonable doubt.'" (*People v. Alvarez* (1996) 14 Cal.4th 155, 225, quoting *People v. Mickey* (1991) 54 Cal.3d 612, 678, fn. omitted.) We presume in support of the judgment the existence of every fact the trier of fact reasonably could infer from the evidence. (*People v. Ramirez* (2006) 39 Cal.4th 398, 463.) If the circumstances reasonably justify the trier of fact's findings, reversal of the judgment is not warranted simply because the circumstances might also reasonably be reconciled with a contrary finding. (*People v. Valdez, supra*, at p. 104.) A reviewing court neither reweighs evidence nor reevaluates a witness's credibility. (*People v. Guerra* (2006) 37 Cal.4th 1067, 1129.)

Under the felony-murder rule, a murder "committed in the perpetration of, or attempt to perpetrate" one of several enumerated felonies, including robbery, is first degree murder. (§ 189.) The robbery-murder special circumstance applies to a murder "committed while the defendant was engaged in … the commission of, [or] attempted commission of," robbery. (§ 190.2, subd. (a)(17)(A).) "[T]o prove a felony-murder special-circumstance allegation, the prosecution must show that the defendant had an independent purpose for the commission of the felony, that is, the commission of the

felony was not merely incidental to an intended murder." (*People v. Mendoza* (2000) 24 Cal.4th 130, 182.) To prove a robbery-murder special circumstance, the prosecution must prove the defendant formed the intent to steal before or while killing the victim. (*People v. Valdez*, *supra*, 32 Cal.4th at p. 105.)

To be convicted of attempted robbery, the perpetrator must harbor a specific intent to commit robbery and commit a direct but ineffectual act toward the commission of the crime. (*People v. Medina* (2007) 41 Cal.4th 685, 694.) The jury may infer a defendant's specific intent to commit a crime from all of the facts and circumstances shown by the evidence. (See *People v. Bloom* (1989) 48 Cal.3d 1194, 1208 ["Evidence of a defendant's state of mind is almost inevitably circumstantial, but circumstantial evidence is as sufficient as direct evidence to support a conviction"].)

Accomplice testimony must be corroborated to supply substantial evidence to support a conviction. (*People v. Najera* (2008) 43 Cal.4th 1132, 1136-1137.) "A conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof." (§ 1111.)

Only slight corroboration is required, however, and the evidence need not corroborate the accomplice as to every fact to which he or she testifies. (*People v. Williams* (1997) 16 Cal.4th 635, 680-681.)

> "The corroborating evidence may be circumstantial or slight and entitled to little consideration when standing alone, and it must tend to implicate the defendant by relating to an act that is an element of the crime. The corroborating evidence need not by itself establish every element of the crime, but it must, without aid from the accomplice's testimony, tend to connect the defendant with the crime." (*People v. McDermott* (2002) 28 Cal.4th 946, 986; see also *People v. Narvaez* (2002) 104 Cal.App.4th 1295, 1303.)

Accomplice testimony may not be corroborated by testimony from another accomplice. (*People v. Davis* (2005) 36 Cal.4th 510, 543.) Also, it is "not sufficient to

merely connect a defendant with the accomplice or other persons participating in the crime. The evidence must connect the defendant with the crime, not simply with its perpetrators. [Citations.]" (*People v. Falconer* (1988) 201 Cal.App.3d 1540, 1543.)

"Accomplice testimony … must be corroborated because it is inherently suspect" in that accomplices usually testify in "'the hope of favor or the expectation of immunity.'" (*People v. Narvaez, supra*, 104 Cal.App.4th at p. 1304, quoting *People v. Coffey* (1911) 161 Cal. 433, 438.) The "usual problem" with accomplice testimony is that "'it is consciously self-interested and calculated.'" (*People v. Williams* (1997) 16 Cal.4th 153, 245, quoting *People v. Sully* (1991) 53 Cal.3d 1195, 1230.)

Appellant's own confession to officers that he shot Cha three or four times with a nine-millimeter handgun is corroborating evidence, independent of Lee's testimony, which certainly implicates appellant in the murders of Cha and Saetern. "'Admissions … of an accused may constitute a sufficient corroboration of the accomplice's testimony to warrant conviction.'" (*People v. Newman* (1954) 127 Cal.App.2d 430, 435; see also *People v. Williams*, *supra*, 16 Cal.4th at p. 680.) In addition, subsequent ballistic and bullet evidence corroborated Lee's testimony and appellant's confession regarding the shootings of Cha, who died of multiple gunshot wounds.

If it is required, there also is sufficient independent corroborating evidence that appellant intended to participate in a robbery of Cha and Saetern. Although appellant denied he intended to rob or kill anyone, he admitted that he armed himself for the encounter. When Cha's and Saetern's bodies were discovered, police found $3,800 in cash in Cha's sock and $16,000 in cash in an envelope under his shirt, providing evidence of a motive and thus corroboration of Lee's testimony and hearsay statement that a robbery was planned.

As counsel for appellant admits in the opening brief, the independent evidence that cell phones and a wallet were taken from the victims was evidence of the taking element of robbery. It also demonstrated at least that the assailants searched the bodies of the victims and, thus, it constituted circumstantial evidence of a pre-formed intent to rob.

Various phone records showed several calls between Lee and appellant on the evening of July 26, 2006, corroborating Lee's testimony that he called appellant several times and discussed the "bad dope" and robbing the victims.

Lastly, the circumstances of the encounter themselves support the theory that a robbery was planned. These include the use of poorly disguised "bad dope" as well as the selection of a remote location for the crime. While the circumstances of an offense may not be sufficient to corroborate an accomplice, nothing in section 1111 makes the circumstances irrelevant at least so long as other independent evidence corroborates the defendant's participation.

> "Corroborative evidence sufficient to satisfy section 1111 need not corroborate every fact to which the accomplice testified or establish the corpus delicti, but is sufficient if it tends to connect the defendant with the crime in such a way as to satisfy a fact finder the accomplice is telling the truth." (*People v. Williams, supra,* 16 Cal.4th at p. 246.)

Appellant maintains that the corroborating evidence here is not credible, or that there are other explanations for the corroborating evidence. But appellant merely urges this court to reweigh the evidence and indulge in inferences that undermine, rather than support, his convictions. This we will not do.

The authorities appellant cites are distinguishable. In *People v. Falconer*, several intruders attempted to steal marijuana plants from another person's property. Falconer was the father of one of the intruders. An accomplice testified that Falconer planned and participated in the raid. Nonaccomplice witnesses testified that, months before the raid, Falconer purchased marijuana from the owner of the property. (*People v. Falconer, supra*, 201 Cal.App.3d at p. 1542.) The court held that the accomplice's testimony was not corroborated because the independent evidence linked Falconer to one of the intruders and to the owner of the property, but not to the crime. (*Id.* at p. 1543.)

Here, unlike *People v. Falconer*, there was corroborating evidence, including appellant's confession, that appellant was with the victims and the accomplices when the crimes occurred. Appellant confessed that he shot one of the victims three or four times

in the torso with a nine-millimeter gun, a fact further corroborated by subsequent ballistic evidence. "[M]ere association with an accomplice in and of itself is insufficient evidence to connect a defendant with a crime [citation], [but] such association when considered in conjunction with other corroborating circumstances has been held to be a factor tending to connect an accused with the commission of the offense." (*People v. Moore* (1963) 211 Cal.App.2d 585, 594.)

And in *People v. Martinez* (1982) 132 Cal.App.3d 119, the appellate court concluded that there was insufficient corroborating evidence when the testimony of an accomplice identifying the defendant as a robber was supported only by another witness testifying that the defendant's complexion was "exactly like" that of the robber, where that witness also testified, contrary to the accomplice, that the robber had a beard. (*Id.* at p. 133.) The robbery victim testified that he could not see the defendants during the commission of the crime because it was dark, the perpetrators shone a flashlight into his eyes, and all wore something tied over the lower parts of their faces. (*Id.* at p. 124.) Other testimony from police officers related merely to "'the commission of the offense or the circumstances thereof,'" and did not connect the defendant to the crime. (*Id.* at p. 133.) In contrast, corroborating evidence in this case showed appellant's motive for the robbery, placed appellant at the scene of the crime, and supported the identification of appellant as the shooter.

We conclude the record contains substantial evidence supporting the convictions. Bearing in mind that corroborative evidence may be entirely circumstantial (*People v. Hayes* (1999) 21 Cal.4th 1211, 1271), the corroborating evidence here tended to show both appellant's participation in the murders and an intent on appellant's part to rob the victims: Appellant's own admission placed him at the remote scene of the crime, armed with a firearm; the victims were shot from behind with no indication that they were the aggressors in the crime; there was an incentive to rob the victims, who were carrying a large amount of money; the "bad dope" was poorly disguised, indicating that Lee and the

others would have had little hope of a successful "rip-off" and thus may well have planned a robbery alternative.

While none of the corroborating evidence is overwhelming, it does implicate appellant in a plan to rob the men.

> "'It is sufficient if the corroborating evidence tends to connect the defendant with the commission of the offense, though if it stood alone it would be entitled to little weight. It is not necessary to corroborate the accomplice by direct evidence. If the connection of the accused with the alleged crime may be inferred from the corroborating evidence in the case it is sufficient.'" (*People v. Rice* (1938) 29 Cal.App.2d 614, 619, quoting *People v. Yeager* (1924) 194 Cal. 452, 473.)

The determination of the trier of fact on the issue of corroboration is binding on the reviewing court unless the corroborating evidence should not have been admitted or does not reasonably tend to connect the defendant with the commission of the crime. (*People v. McDermott*, *supra*, 28 Cal.4th at p. 986; *People v. Narvaez*, *supra*, 104 Cal.App.4th at p. 1303.)

Here the jury's determination is within the bounds of reason and the mandate of section 1111 is satisfied. We reject appellant's contention to the contrary.

3. Accomplice Testimony Instruction

Appellant also contends the judgment of guilt must be reversed because the accomplice instruction the court gave under Judicial Council of California Criminal Jury Instructions (2007) CALCRIM No. 335 did not include "three important principles relating to accomplice corroboration." Specifically, appellant maintains that CALCRIM No. 335 failed to inform the jury (1) that the independent corroborative evidence must connect the defendant to the commission of the crime and not merely to those who committed it; (2) that analysis of the allegedly independent corroborative evidence must be evaluated entirely without reference to the testimony of the accomplices; and (3) that the jury must find a connection between the defendant's conduct and an element of the crime. We reject appellant's argument and find the instructions sufficient.

The court instructed the jury with CALCRIM No. 335, as follows:

> "If the crimes of murder or any lesser-included offense were committed, then Kou Lee is an accomplice to that crime. You may not convict the defendants of murder or any lesser-included offense based on the statement or testimony of an accomplice alone. [¶] You may use the statement or testimony of an accomplice to convict the defendant only if: [¶] Number one, the accomplice's statement or testimony is supported by other evidence that you believe; [¶] Number two, that supporting evidence is independent of the accomplice's statement or testimony; [¶] Number three, the supporting evidence tends to connect the defendant in the commission of the crime. [¶] Supporting evidence, however, may be [slight]. It does not need to be enough by itself to prove that the defendant is guilty of the charged crime and it does not need to support every fact mentioned by the accomplice in the statement or about which the witness testified. [¶] On the other hand, it's not enough if the supporting evidence merely shows that a crime was committed or the circumstances of its commission. The supporting evidence must tend to connect the defendant to the commission of the crime. [¶] The evidence needed to support the statement or testimony of one accomplice cannot be provided by the statement or testimony of another accomplice. [¶] Any statement or testimony of an accomplice that tends to incriminate the defendant should be viewed with caution. You may not, however, arbitrarily disregard it. You should give that statement or testimony the weight you think it deserves after examining it with care and caution and in the light of all the other evidence."

Appellant has forfeited a challenge to the completeness of the accomplice instruction by failing to request clarifying or amplifying language in the trial court. (*People v. Riggs* (2008) 44 Cal.4th 248, 309.)

In any event, appellant's claim that CALCRIM No. 335 as given by the court failed to include "three important principles relating to accomplice corroboration" is unavailing. Although appellant claims the instruction failed to inform the jury that the independent corroborative evidence must connect the defendant to the commission of the crime, and not merely to those who committed it, the instruction specifically stated "[t]he supporting evidence must tend to connect the defendant to the commission of the crime." And although appellant claims the instruction failed to inform the jury that the analysis of the independent corroborative evidence must be evaluated entirely without reference to the testimony of the accomplice, the instruction specifically stated that accomplice

testimony could only be used if "that supporting evidence is independent of the accomplice's statement or testimony." (CALCRIM No. 335.)

And finally, although appellant claims the instruction failed to inform the jury that it must find a connection between the defendant's conduct and an element of the crime, section 1111 does not explicitly contain the requirement that corroborative evidence relate to an element of the crime. Instead, it states only that the corroborating evidence must "tend to connect the defendant with the commission of the offense …." (§ 1111.)

In *People v. Jenkins* (1973) 34 Cal.App.3d 893, the trial court instructed the jury using CALJIC No. 3.12, which similarly uses the wording of the statute and does not amplify the corroboration requirement by stating that the corroborating evidence must relate to an element of the crime. In *Jenkins*, the defendant argued that the trial court erred in refusing to add to the instruction the statement: "'Such corroborative evidence must relate to some act or fact which is an element of the offense charged.'" While the *Jenkins* court stated that the proposed amendment was a correct statement of law (see, e.g., *People v. Williams*, *supra*, 16 Cal.4th at pp. 680-681), the test to be applied "is not whether the proposed instruction was correct, but whether the jury was fully and fairly instructed on the applicable law." (*People v. Jenkins*, *supra*, at p. 899.) Although the defendants in *Jenkins* argued, as does appellant here, that the instruction given would allow corroboration to be of irrelevant parts of the accomplice testimony, the court disagreed and found the instruction not "subject to that infirmity" and found no error. (*Ibid.*)

Appellant also contends that the giving of other CALCRIM instructions "tended to obfuscate the Section 1111 requirement of independent corroborative evidence." Specifically, he claims that the giving of CALCRIM No. 226 told the jury that it might believe "any witness's testimony" and that "each witness['s]" testimony is evaluated by the "same standard." And he claims that CALCRIM Nos. 358 and 359 told the jury it could weigh his own statements against him, even though testimony as to those statements came in as hearsay through Lee. Again, we find his argument unavailing.

We first note that appellant did not object below that any of these instructions were incorrect statements of law or request that any of them should be modified or limited with regard to the parsed language of each about which he now complains. Generally, a failure to object to instructional error forfeits the issue on appeal if the instruction is correct in law and the defendant has failed to request clarification. (*People v. Guerra*, *supra*, 37 Cal.4th at p. 1138; *People v. Campos* (2007) 156 Cal.App.4th 1228, 1236, fn. 6.) The three challenged instructions have been found to be legally correct instructions. (*People v. Warner* (2008) 166 Cal.App.4th 653, 656-659 [discussing CALCRIM No. 226]; *People v. Campos*, *supra*, at pp. 1239-1240 [same]; *People v. Deloney* (1953) 41 Cal.2d 832, 841 [discussing instruction on admissions of defendant]; *People v. Reyes* (2007) 151 Cal.App.4th 1491, 1498 [discussing CALCRIM No. 359].) Although we believe appellant has technically forfeited his instructional claim by failing to object to the particular language of each properly given instruction he now challenges, we briefly address and reject his arguments that the giving of the instructions, which he claims allowed him to be convicted based only on accomplice testimony without adequate corroboration, violated his due process rights.

CALCRIM No. 226 instructed the jury on various factors it can consider in evaluating the credibility of a witness. Appellant's claim concerning the instruction—the jury is to believe "any witness" and evaluate each the same—is taken out of context. The instruction as given stated, inter alia,

> "You alone must judge the credibility or the believability of the witnesses. In deciding whether testimony is true and accurate, use your common sense and experience. The testimony of each witness must be judged by the same standard. You must set aside any bias or prejudice you may have including any based on the witness' gender, race, religion, national origin, or use of an interpreter. [¶] You may believe all part or none of any witness' testimony. [¶] Consider the testimony of each witness and decide how much of it you believe."

And appellant's concern that CALCRIM Nos. 358 and 359 told the jury it could weigh his own statements against him, even though the statements came in as hearsay through Lee, is also taken out of context. CALCRIM No. 358 states, in its entirety:

> "You have heard evidence that the defendants have made oral statements before the trial. You must decide whether or not any defendants made any of these statements in whole or in part. If you decide that a defendant made such a statement, consider the statement along with all the other evidence in reaching your verdict. [¶] It is up to you to decide how much importance to give to such statements. [¶] You must consider with caution evidence of a defendant's oral statement unless [it] was written or otherwise recorded."

Furthermore, CALCRIM No. 359 specifically states that a defendant "may not be convicted of any crime based on his or her out-of-court statements alone."

We evaluate whether an instruction is misleading by reviewing the instructions as a whole. (*People v. Campos*, *supra*, 156 Cal.App.4th at p. 1237.) An instruction is only misleading if in the context of the entire charge there is a reasonable likelihood that the jury misconstrued or misapplied its words. (*Ibid.*) We conclude the trial court properly instructed the jury on appellant's out-of-court statements and on accomplice Lee's statements and testimony.

4. Instructions on Theft

In supplemental briefing, appellant contends that the trial court erred prejudicially when it refused to "give the defense requested pinpoint instructions about the effect of recent possession of stolen property and theft based on after-formed intent to commit theft." (Capitalization omitted.) We disagree.

During on-the-record discussion about requested jury instructions, the trial court refused Bacud's and Vang's request that it give CALCRIM No. 376, plus "additions to 376," listed in the record as special instructions Nos. 376A, 376B, and 376C.[6] CALCRIM No. 376 is titled Possession of Recently Stolen Property as Evidence of a Crime and states:

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[6]Given our disposition of the issue raised here, we need not decide whether appellant joined in this request.

> "If you conclude that the defendant knew he or she possessed property and you conclude that the property had in fact been recently stolen, you may not convict the defendant of murder or any lesser offense based on those facts alone. However, if you also find that supporting evidence tends to prove his or her guilt, then you may conclude that the evidence is sufficient to prove he or she committed murder or any lesser offense. [¶] The supporting evidence need only be slight and need not be enough by itself to prove guilt. You may consider how, where, and when the defendant possessed the property, along with any other relevant circumstances tending to prove his or her guilt of murder or any lesser offense. [¶] Remember that you may not convict the defendant of any crime unless you are convinced that each fact essential to the conclusion that the defendant is guilty of that crime has been proved beyond a reasonable doubt."

The requested additions to CALCRIM No. 376 defined "knowing possession" of stolen property, defined the term "recently" within the context of "recently stolen property," and instructed the jury that it "may not convict the accused of any crime unless you find that each fact essential to the conclusion that he or she is guilty of that crime has been proved beyond a reasonable doubt."

The trial court also denied Bacud's request, in which appellant joined, for instruction with CALCRIM Nos. 1800 and 1801, which instruct on the elements of theft and explain the distinction between grand theft and petty theft. Bacud's counsel explained that, as discussed in chambers, he thought the court should give CALCRIM Nos. 1800 and 1801 "on the lesser, even though the robbery isn't alleged, because I feel it would be important for the jury to understand the difference between a robbery and a theft, and that the robbery requires the use of force with the taking of the property." Appellant's counsel acknowledged that such instructions were not required if covered by other instructions, but requested them nonetheless "just to emphasize the importance because it's such a critical issue in this case, that is, the—a victim's property was apparently taken after his death." The court denied the theft instructions, citing the "*Barker* case."[7]

[7]Appellant believes the court was referring to *People v. Barker* (2001) 91 Cal.App.4th 1166, 1172-1177, in which the appellate court recommended limiting the instruction (CALJIC

Appellant repeats here the arguments made below and, in addition, argues that theft is a lesser included offense of robbery-felony-murder, even where the robbery is not alleged and serves only as the predicate crime for the felony murder.

The trial court has a sua sponte duty to instruct the jury on the general legal principles that are closely and openly connected with the evidence and necessary for the jury's understanding of the case. (*People v. Flannel* (1979) 25 Cal.3d 668, 680-681, superseded by statute on other grounds as stated in *In re Christian S.* (1994) 7 Cal.4th 768, 774-775.) "A defendant is entitled to have the court instruct on a defense theory if it is supported by substantial evidence, i.e., if a reasonable jury could conclude the particular facts underlying the instruction existed. [Citations.]" (*People v. Sullivan* (1989) 215 Cal.App.3d 1446, 1450.) A defendant may request, and a trial court must give, pinpoint instructions relating to the theory of the defense. (*People v. Earp* (1999) 20 Cal.4th 826, 886.)

Here the defense argued that Lee and/or Vang took the cell phones and a wallet from the victims only as an afterthought to make it more difficult for authorities to identify Cha and Saetern, and that, therefore, only a theft occurred and not a robbery.

Our Supreme Court has held that, although theft is a lesser included offense of robbery (*People v. Ortega* (1998) 19 Cal.4th 686, 694-695, overruled on another point in *People v. Reed* (2006) 38 Cal.4th 1224), there is no basis for a theft instruction when a defendant faces a charge not of robbery but of robbery-felony-murder. (*People v. Valdez*, *supra*, 32 Cal.4th at pp. 110-111 ["when robbery is not a charged offense but merely forms the basis for a felony-murder charge and a special circumstance allegation, a trial court does not have a sua sponte duty to instruct the jury on theft"]; see also *People v. Cash* (2002) 28 Cal.4th 703, 737; *People v. Silva* (2001) 25 Cal.4th 345, 371.) In *People v. Silva*, the defendant was not charged with robbery but the trial court instructed the jury

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No. 2.15, Possession of Stolen Property) to theft and theft-related crimes, and disapproving its use to infer guilt of murder.

on murder based on a robbery-felony-murder theory. The defendant maintained that "the trial court on its own initiative should … have instructed on the elements of theft as a lesser included offense of robbery." (*Silva*, *supra*, at p. 371.) The defendant argued that the jury could have found that his taking of property constituted theft instead of robbery, in which event the felony-murder rule would have been inapplicable. Our Supreme Court held that, in these circumstances, the trial court did not have a duty to instruct sua sponte on theft:

> "Although a trial court on its own initiative must instruct the jury on lesser included offenses of *charged* offenses, this duty does not extend to *uncharged* offenses relevant only as predicate offenses under the felony-murder doctrine. [Citations.] Because defendant was not charged with robbery, the trial court did not have to instruct the jury on theft as a lesser included offense of robbery." (*Ibid.*; see also *People v. Cash*, *supra*, 28 Cal.4th at pp. 736-737.)

As in *Valdez*, *Cash*, and *Silva*, appellant here was not charged with robbery; rather, robbery was the predicate offense in the felony-murder charge and the special circumstance allegation.

Appellant argues not only that we should recognize theft as a lesser included offense, requiring instruction despite the holdings in *Valdez*, *Cash*, and *Silva*, but also that those holdings do not apply here because the instructions on theft were "requested as defense pinpoint instructions and supported by substantial evidence."

In appropriate circumstances, a trial court has a duty to grant a request for a pinpoint instruction on a defense theory of the case that, among other things, relates the reasonable doubt standard of proof to particular elements of the crime charged. But a trial court need not give a pinpoint instruction that is argumentative or merely duplicates other instructions given. (*People v. Bolden* (2002) 29 Cal.4th 515, 558.) "An instruction that does no more than affirm that the prosecution must prove a particular element of a charged offense beyond a reasonable doubt merely duplicates the standard instructions defining the charged offense and explaining the prosecution's burden to prove guilt beyond a reasonable doubt." (*Id.* at pp. 558-559.) So a trial court "is required to give a

requested instruction relating the reasonable doubt standard of proof to a particular element of the crime charged only when the point of the instruction would not be readily apparent to the jury from the remaining instructions." (*Id.* at p. 559.)

Even assuming arguendo, however, that the trial court should have given some instruction on theft, either as a lesser offense or as a defense pinpoint instruction, the error was not prejudicial. An erroneous failure to give a requested pinpoint instruction is subject to harmless error analysis. (E.g., *People v. Wright* (1988) 45 Cal.3d 1126, 1144.) Error in omitting an instruction is harmless when the factual question posed by the instruction was necessarily resolved adversely to the defendant under other, properly given instructions. (See, e.g., *People v. Sedeno* (1974) 10 Cal.3d 703, 721, overruled in part on a different ground in *People v. Breverman* (1998) 19 Cal.4th 142, 163, fn. 10.) The same test applies where the question is prejudice from the failure to instruct on a lesser included offense. (*People v. Ramkeesoon* (1985) 39 Cal.3d 346, 352-353.)

Here, the jury was properly instructed on reasonable doubt. (CALCRIM No. 103.) It was also properly instructed on the general use of circumstantial evidence: that a finding of guilt cannot be based only on circumstantial evidence unless the proved circumstances cannot be reconciled with any other conclusion and that, if the proved circumstances point reasonably to guilt or innocence, the jury must adopt the interpretation pointing to innocence. (CALCRIM No. 224.)

And, contrary to appellant's argument, the standard instructions given on felony murder (CALCRIM No. 540B), robbery (CALCRIM No. 1600), and attempted robbery (CALCRIM No. 460) adequately covered the issue of the time of formation of the intent to steal. (See *People v. Valdez, supra,* 32 Cal.4th at pp. 111-112 [standard instructions on first degree murder and robbery generally cover issue regarding formation of intent to steal].) The felony-murder instruction stated that, to be first degree murder, "[t]he defendant must have intended to commit or aid and abet or been a member of a conspiracy to commit the felony of robbery before or at the time of the act causing the death." The robbery instruction stated, inter alia, "[t]he defendant must have intended to

commit or aided and abetted or been a member of a conspiracy to commit the felony of robbery or attempted robbery before or at the time of the act causing the death." The instruction also stated that "[t]he defendant's intent to take the property must have been formed before or during the time he or she used force or fear."

In addition to the instructions given, the prosecutor repeatedly stated during argument that the felony murder, robbery, and attempted robbery required appellant's and the codefendants' plan to rob the victims and the intent to take their property. Vang's counsel also emphasized the required intent to rob in order to find felony murder. Bacud's counsel argued that if a defendant decided to shoot and kill the victims and then decides to take the property, "that is not a robbery."

Contrary to appellant's contention, this is not a case like *Ramkeesoon,* yet another case involving an alleged robbery-felony-murder in which the defendant claimed an after-acquired intent to steal. There the court found prejudice from the trial court's refusal to instruct on theft[8] because the jury was never presented with the factual question posed by the omitted instruction. Instead, the jury was simply instructed on robbery and on felony murder, neither of which instruction required that the jury "decide specifically whether defendant had formed the intent to steal after the assault." (*People v. Ramkeesoon, supra,* 39 Cal.3d at p. 352.)

Here a reasonable juror would necessarily have understood from the instructions and attorney arguments that appellant "was guilty of robbery-murder only if the intent to steal was formed before the fatal blow was struck." (*People v. Hayes* (1990) 52 Cal.3d 577, 629; see also *People v. Fudge* (1994) 7 Cal.4th 1075, 1110-1111 [whether issue omitted from instruction was addressed in counsel's closing is factor to be considered in assessing likely prejudice].)

> "Here, the instructions actually given and the verdicts actually rendered persuade us beyond doubt that the jury considered the question of

[8]Because robbery was charged, theft was a lesser included offense. (*People v. Ramkeesoon, supra,* 39 Cal.3d at pp. 348, 351.)

> 'after-formed intent' and rejected this 'mere theft' theory on its merits. Accordingly, we conclude defendant suffered no prejudice." (*People v. Turner* (1990) 50 Cal.3d 668, 690-691 [defendant not prejudiced by court's failure to provide instruction and verdict forms which would permit convictions and findings based on theft rather than robbery].)

5. Cumulative Error

Finally, appellant contends "[t]he errors pertaining to the accomplice testimony had a cumulative impact on the constitutionality of the trial." This contention is without merit.

"Lengthy criminal trials are rarely perfect, and this court will not reverse a judgment absent a clear showing of a miscarriage of justice. [Citations.]" (*People v. Hill* (1998) 17 Cal.4th 800, 844.) "Nevertheless, a series of trial errors, though independently harmless, may in some circumstances rise by accretion to the level of reversible and prejudicial error." (*Ibid.*) Because we have concluded that there were no prejudicial errors, it follows that there were no errors to cumulate, and we reject appellant's argument to the contrary.

DISPOSITION

The matter is remanded to correct the abstract of judgment to accurately reflect the enhancements were imposed pursuant to section 12022.53, subdivision (c) instead of section 190.2, subdivision (a)(17). The trial court shall forward a copy of the amended abstract of judgment to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

_____
DAWSON, J.

WE CONCUR:

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CORNELL, Acting P.J.

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KANE, J.